Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-470 (2)

In The

Supreme Court of The United States

October Term 1985

Eddie Cortez, Et Ux., Individually
and d/b/a The Cortez Agency,

Petitioners,

v.

Unauthorized Practice of Law Committee,
State Bar of Texas

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Gregory S. C. Huffman
1700 Pacific Avenue
3300 First City Center
Dallas, Texas 75201
(214) 969-1700

Attorney for Respondent

Of Counsel:

Thompson & Knight
Dallas, Texas

Bertran T. Bader III
211 North Ervay, Suite 1004
Dallas, Texas 75201

BEST AVAILABLE COPY

21 pp

NO. 85-470

In The

Supreme Court of The United States

October Term 1985

Eddie Cortez, Et Ux., Individually and d/b/a The Cortez Agency,

Petitioners,

v.

Unauthorized Practice of Law Committee, State Bar of Texas

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the Unauthorized Practice of Law Committee of the State Bar of Texas, respectfully requests that this court deny the petition for Writ of Certiorari, seeking review of the opinion of the Supreme Court of Texas in this case. That opinion is reported at 692 S.W.2d 47.

QUESTIONS PRESENTED

1. Whether a judge's interpretation of what constitutes the unauthorized practice of law violates equal protection and due process rights.

2. Whether a state may regulate companies providing immigration services within its boundaries when there is no conflict with federal legislation.

3. Whether an injunction against advertising certain services which constitute the unauthorized practice of law violates the First and Fourteenth Amendment rights of freedom of speech.

TABLE OF CONTENTS

Page

Questions Presented 1

Table of Contents 2

Table of Authorities. 3

Statement of the Case 5

Summary of Arguments. 7

I. BY ALLOWING JUDGES TO DETERMINE WHAT ACTIVITIES CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW, TEX. REV. CIV. STAT. ANN. ART. 320a-1 DOES NOT VIOLATE PETITIONERS' EQUAL PROTECTION OR DUE PROCESS RIGHTS 9

II. FEDERAL LAW HAS NOT PREEMPTED TEX. REV. CIV. STAT. ANN. ART. 320a-1 WITH RESPECT TO THE IMMIGRATION ADVICE AND SERVICES PROVIDED BY THE CORTEZ AGENCY BECAUSE THE TEXAS STATUTE IS NOT IN CONFLICT WITH ANY FEDERAL LAW. 12

III. THE INJUNCTION ISSUED AGAINST THE CORTEZ AGENCY DOES NOT VIOLATE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT RIGHT OF FREEDOM OF SPEECH BECAUSE THE ACTIVITIES BEING ADVERTISED CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW. 17

Conclusion 19

TABLE OF AUTHORITIES

	PAGE
Bryant v. State, 457 S.W.2d 72 (Tex. Civ. App. -- Eastland 1970, writ ref'd n.r.e.)	12
Central Hudson Gas & Electric Corp. v. Public Service Com., 447 U.S. 557 (1980)	18
Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957)	11
Darby v. Mississippi State Bd. of Bar Admissions, 185 So.2d 684 (Miss. 1966)	12
Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, (1972)	10
Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965)	11
Free v. Bland, 369 U.S. 663 (1962)	13
Friedman v. Rogers, 440 U.S. 1 (1979)	17
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	11, 18
Matter of Arthur, 15 B.R. 541 (E.D. Pa. 1981)	11
Public Service Commission v. Hahn Transportation Inc., 253 Md. 571, 253 A.2d 845 (1969)	11
In re R.M.J., 455 U.S. 191 (1982)	18

PAGE

S.E.C. v. New England Electric System, 390 U.S. 207 (1968) 10

Sperry v. Florida, 373 U.S. 379 (1963) 11, 13, 18

State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc., 6 Wis.2d 643, 154 N.W.2d 250 (1967) 11

Schwartz v. Texas, 344 U.S. 199 (1952) 16

Weemes v. Supreme Court Committee on Professional Conduct, 257 Ark. 673, 253 S.W.2d 900 (1975) 11

In re Unauthorized Practice of Law, 175 Ohio St. 149, 192 N.E.2d 52, cert. denied, 376 U.S. 970 (1964) 12

STATUTES

Tex. Rev. Civ. Stat. Ann. art. 320a-1, §§ 10 and (Vernon Supp. 1985) 5, 8, 9, 11, 12, 13, 15, 18

REGULATIONS

8 C.F.R. § 292.1 (1985) 14, 15, 16

STATEMENT OF CASE

The Unauthorized Practice of Law Committee of the State Bar of Texas brought this action to enjoin a private immigration agency from providing services that constitute the unauthorized practice of law. The action was brought pursuant to Tex. Rev. Civ. Stat. Ann. art. 320a-1, §§ 10(a) and 19 (Vernon Supp. 1985).

Eddie and Rita Cortez are engaged in the City of Dallas in the business of providing immigration services under the trade name, The Cortez Agency. Neither Mr. nor Mrs. Cortez is, or ever has been, a licensed attorney-at-law. In their business the Cortez Agency solicits persons who are seeking to obtain immigration visas and permanent residency. One method of solicitation is to advertise the Agency in a Spanish language newspaper. A translation of a typical advertisement reads, "The Cortez

Agency has had 35 years of experience in every kind of immigration case. Consultation of Immigration by Cortez." The Cortez Agency interviews and advises customers, selects and fills out immigration forms provided by the Immigration and Naturalization Service, and performs other services related to immigration procedures. The Agency has also assisted clients in filing various petitions with the INS to establish or adjust the status of resident or nonresident aliens. The Cortez Agency charges a fee, usually $400.00 paid in advance, for the services it provides.

The Unauthorized Practice of Law Committee brought suit to enjoin the immigration activities of the Cortez Agency. At trial, the evidence was undisputed as to the types of activities being performed by the Cortez Agency, but the jury found that those activities did

not require the use of legal skill and knowledge. The trial court entered a judgment n.o.v. in favor of the Committee, ruling that those activities did constitute the unauthorized practice of law. The Cortez Agency was permanently enjoined from engaging in these activities. The Court of Appeals reversed and rendered judgment for the plaintiffs. The Texas Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court. The Cortez Agency has now filed this Petition for Writ of Certiorari before this Court.

SUMMARY OF THE ARGUMENTS

The state legislature may empower courts to determine what constitutes the unauthorized practice of law. Courts frequently defer to determinations made by those having special expertise, as in the area of administrative law. Allowing judges to interpret what activities

violate the unauthorized practice of law statute is a reasonable exercise of judicial expertise.

In the absence of federal legislation, a state may regulate activities that constitute the unauthorized practice of law. Tex. Rev. Civ. Stat. Ann. art. 320a-1, §§ 10(a) and 19(a) do not conflict with any federal legislation or regulation, and therefore have not been preempted by federal law.

Where individuals are engaged in activities that constitute the unauthorized practice of law, enjoining the advertising of such activities does not violate the First and Fourteenth Amendment right of freedom of speech. There is no constitutional right to advertise illegal activities.

I.

BY ALLOWING JUDGES TO DETERMINE WHAT ACTIVITIES CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW, TEX. REV. CIV. STAT. ANN. ART. 320a-1 DOES NOT VIOLATE PETITIONERS' EQUAL PROTECTION OR DUE PROCESS RIGHTS.

The Texas Supreme Court held in Cortez that where facts relating to activities alleged to be the practice of law are undisputed, it is for a judge to decide whether those activities amount to practicing law. Petitioners claim that this holding denies them equal protection and due process rights because individuals accused of the unauthorized practice of other professions are purportedly entitled to a jury determination of what constitutes the unauthorized practice of those professions. It is the contention of petitioners that allowing judges to decide what constitutes the practice of law constitutes arbitrary state action.

Petitioners state no authority in support of their eleventh-hour argument.

Their simplistic argument not only assumes facts not before this Court, but also totally ignores the judiciary's special expertise in determining what activities violate the unauthorized practice of law statute.

Matters involving special expertise are frequently delegated for decision. This has been particularly true in the area of administrative law. Where administrative agencies have been empowered to make even factual findings, the U.S. Supreme Court has repeatedly held that the agency's expertise as applied to the case is to be accorded great deference. See, e.g., Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, (1972); S.E.C. v. The New England Electric System, 390 U.S. 207 (1968).

The U.S. Supreme Court has recognized that the states have a compelling interest in regulating the practice of law within

their boundaries. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Sperry v. Florida, 373 U.S. 379 (1963). The Texas legislature in Tex. Rev. Civ. Stat. Ann. art. 320a-1, § 19(a) has expressly determined that the judiciary is best situated "to determine whether other services and acts not enumerated in this Act may constitute the practice of law."[1/] Given the compelling state

---

1/ The power to regulate and define what constitutes the practice of law is also vested in the judiciary in a number of other states. See, e.g., Matter of Arthur, 15 B.R. 541 (E.D. Pa. 1981); Weemes v. Supreme Court Committee on Professional Conduct, 257 Ark. 673, 253 S.W.2d 900 (1975); Public Service Commission v. Hahn Transportation, Inc., 253 Md. 571, 253 A.2d 845 (1969); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); State ex rel. State Bar of Wisconsin v. Bonded Collection, Inc., 6 Wis.2d 343, 154 N.W.2d 250 (1967). Furthermore, some courts have held that the judiciary has the inherent

(Continued on Page 12)

interest in regulating the practice of law and given the judiciary's legislatively-recognized expertise in this area, petitioners fail to state any legitimate, much less compelling basis for concluding that they have been denied equal protection or due process rights.

II.

FEDERAL LAW HAS NOT PREEMPTED TEX. REV. CIV. STAT. ANN. ART. 320a-1 WITH RESPECT TO THE IMMIGRATION ADVICE AND SERVICES PROVIDED BY THE CORTEZ AGENCY BECAUSE THE TEXAS STATUTE IS NOT IN CONFLICT WITH ANY FEDERAL LAW.

Petitioners assert that federal law has preempted state authority to control

---

1/ (Continued from Page 11)

authority independent of the legislature to determine what constitutes the practice or law. See Bryant v. State, 457 S.W.2d 72 (Tex. Civ. App. -- Eastland 1970, writ ref'd n.r.e.); Darby v. Mississippi State Bd. of Bar Admissions, 185 So.2d 684 (Miss. 1966); In re Unauthorized Practice of Law in Cuiahoga County, 175 Ohio St. 149, 192 N.E.2d 52, 193 N.E.2d 738, cert. denied, 376 U.S. 970 (1964).

activities occurring within its borders related to the practice of immigration law, and that article 320a-1 conflicts with federal law and immigration policies. In the present case, petitioners do not claim express preemption. Under the doctrine of implied preemption, a state law is invalid only where there is an irreconcilable conflict with federal law. Free v. Bland, 369 U.S. 663 (1962).

This Court has stated that in the absence of a contrary federal statute or regulation, a state clearly may prohibit non-lawyers from engaging in activities defined by the state as constituting the unauthorized practice of law, even when such activities involve practicing before federal agencies. Sperry v. Florida, 373 U.S. 379 (1963).

In the present case, there is no conflict between federal law and article 320a-1. Petitioners attempt to

create a conflict by suggesting that the injunction here implicitly conflicts with 8 C.F.R. § 292.1 (1985). Section 292.1 outlines who may represent an individual in appearances before the Immigration and Naturalization Service. Under this regulation, non-lawyers may represent individuals only under certain strictly defined circumstances. One of the requirements is that the non-lawyer must appear without remuneration. 8 C.F.R. § 292.1(3)(ii). Furthermore, section 292.1(3)(iv) provides that permission to represent an individual "shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so."

Petitioners' assertion of a conflict is totally lacking in merit. Under section 292.1, the Cortez Agency is

specifically excluded from representing aliens because the Cortez Agency holds itself out as qualified to handle immigration matters and is compensated for its services. Far from conflicting with section 292.1, article 320a-1 actually promotes the same policy by restricting the involvement of companies illegally providing immigration services. Furthermore, article 320a-1 complements and promotes the policy behind section 292.1 because section 292.1 possibly may be limited to appearances before the administrative agency.

Petitioners also argue that enjoining their activities and those of similar agencies will reduce federal control over immigration and ultimately increase illegal entry by aliens. Petitioners speculate, without any factual support for doing so, that if aliens are forced to retain the attorneys and other persons

authorized in section 292.1, few aliens will be able to have access to the Immigration and Naturalization Service. Yet the Cortez Agency charges a fee of $400.00 for its services, hardly a de minimis fee.

Federal supremacy should not be lightly presumed. The Court should look for a clear manifestation by Congress that the exercise of a state's power has been preempted before declaring a state statute invalid. Schwartz v. Texas, 344 U.S. 199, 202-203 (1952). The U.S. Supreme Court has recognized a state's substantial interest in regulating the practice of law even in areas of substantive federal law, so long as no federal legislation is in conflict with the state statute. Here there is no such conflict, only the speculative and unfounded assumptions by petitioners. The State of Texas may

therefore validly use its statute to protect the public by controlling the unauthorized practice of immigration law.

III.

THE INJUNCTION ISSUED AGAINST THE CORTEZ AGENCY DOES NOT VIOLATE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT RIGHT OF FREEDOM OF SPEECH BECAUSE THE ACTIVITIES BEING ADVERTIZED CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

Petitioners allege that the injunction here violates their First and Fourteenth Amendment right to freedom of speech. Invoking the commercial speech doctrine, petitioners contend that they should not have been prohibited from advertising their immigration consultation services or from soliciting clients.

States have an interest in protecting the public from advertisements offering illegal services. Friedman v. Rogers, 440 U.S. 1 (1979). Commercial speech relating to illegal activities may be restricted where a state has demonstrated that it has a substantial interest in regulating those

activities. In re R.M.J., 455 U.S. 191 (1982); Central Hudson Gas & Electric Corp. v. New York, 447 U.S. 557 (1980). This Court has already held that states have a substantial interest in regulating the practice of professions within their boundaries. Goldfarb, 421 U.S. at 792; Sperry, 373 U.S. at 383.

Where a company is engaged in the unauthorized practice of law, there is no right to advertise such services because the services are illegal activities which the state has a substantial interest in regulating. Because the services provided by the Cortez Agency violate Tex. Rev. Civ. Stat. Ann. art. 320a-1, the injunction against the Agency is therefore not in derogation of petitioners' First and Fourteenth Amendment right to freedom of speech.

CONCLUSION

Petitioners' application should be denied.

Respectfully submitted,

Gregory S. C. Huffman
1700 Pacific Avenue
3300 First City Center
Dallas, Texas 75201

ATTORNEY FOR RESPONDENT

October 16, 1985.